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No. 215

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

JACOB STRAUCH, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

ALEX STRAUCH, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

HARRY BENJAMIN SHER, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Sixth Circuit.

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to the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Jacob Strauch, Alex Strauch, and Harry Benjamin Sher, in these consolidated cases, pray that a writ of certiorari issue to review an order and judgment entered by the Court of Appeals for the Sixth Circuit on April 21, 1954, and the opinion denying the petition for a rehearing entered on June 17, 1954. Said order and judgment affirmed a judgment under which petitioners were convicted and sentenced in the District Court for the Middle District of Tennessee, whereby the petitioners Alex Strauch and Jacob Strauch were each sentenced to three years in the penitentiary and the petitioner Harry Benjamin Sher was sentenced to four years in the penitentiary, and each of the petitioners required to pay a fine of

$5,000.00 and costs for an alleged violation of the provisions of Title 26, section 145 (b) of the United States Code, for wilfully filing false and fraudulent income tax returns for the years 1944 and 1945 and in the case of Jacob Strauch for the additional year of 1946.

OPINIONS BELOW.

The District Court wrote no opinion. The Court of Appeals wrote no opinion disposing of the original appeal but simply entered a two page order affirming the convictions. On petition to rehear the Court of Appeals filed an opinion with one judge filing a dissenting opinion, he having changed his conclusions and felt that the convictions should be reversed. Neither the order of affirmance nor the opinions filed on the petition to rehear have yet been reported, but may be found as an appendix to this petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 21, 1954, and the petition for rehearing was overruled on June 17, 1954. Thereafter an order was entered staying the mandate of the Court pending the filing of this petition. The jurisdiction of this Court is invoked under the provision of Title 20, Section 1224, par. (1) of the United States Code.

QUESTIONS PRESENTED.

The questions presented for review by this petition are:

1. Is evidence of an offer made by a taxpayer in an effort to compromise his civil income tax liability admissible upon the trial of a criminal case in which the taxpayer is charged with wilful and fraudulent income tax evasion?

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2. In the prosecution of a criminal income tax case where the Government seeks to establish tax liability by the so-called "net worth method," if the Government is unable to prove a net worth for the beginning of the period in which it is alleged that the tax liability accrued, should the Court strike all of the evidence relating to the net worth of the taxpayer at other times?

3. Does it amount to plain error affecting substantial rights for the Court to charge the jury what the minimum as well as the maximum penalty might be in the event of a verdict of guilty and to remind the jury that should the defendants be acquitted, the Government could not have their verdict reviewed on appeal?

STATUTES AND RULES OF PROCEDURE INVOLVED.

The petitioners were convicted for alleged violation of the provisions of Title 26, Section 145 (b) (Internal Revenue Code), which reads as follows:

> "(b) Failure to collect any pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution (26 U. S. C. 1946 Ed., Sec. 145 [b])."

Rules 30 and 52 (b) of the Federal Rules of Criminal Procedure, which read as follows, are likewise involved:

"Rule 30.

. . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

"Rule 52.

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

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STATEMENT OF THE CASE.

During the years for which the indictments were returned in these cases, the petitioners were engaged as partners in the jewelry business in Memphis, Tennessee, under the name Strauch & Sher. The Government sought a conviction of the petitioners by attempting to prove that a number of entries shown on their books to be for business expenses or for the purchase of inventory, actually represented a division of profits and, further, to show in at least the case of Jacob Strauch by the so-called "net worth method" that his wealth had increased far beyond the amount upon which he had reported and paid income tax.

In an effort to show that the petitioners had withdrawn money from the partnership under the guise of expense when in fact it represented a division of profits, the Government proved that on September 3, 1943, there was exactly $3,000.00 withdrawn from the partnership account and divided $1,000.00 to each of the petitioners as a refund of traveling expenses (R. 385).

After this was proven, the Court permitted the Government to prove, over the most strenuous objections on the part of all of the petitioners, that in an effort to compromise their civil tax liability with the Government, the petitioners had given the Government a profit and loss statement headed "Restatement of Partnership Income" in which this $3,000.00 item was removed from expenses and charged to "Distribution of Profits" (R. 387, 393; See Plaintiff's Exhibit No. 18, R. 498). The petitioners' objection to this evidence was that the statement was furnished to the Government by the petitioners in support of and as a part of an offer to compromise their civil tax liability and was, therefore, inadmissible in a criminal prosecution (R. 387, 393). The learned trial Judge not only overruled the petitioners' objection, but stated:

> "Well, I don't see why a person wouldn't be required to tell the truth in compromising the civil liability just the same as they would the criminal liability."

And again:

> "Well, when a person makes a statement for the purpose of getting an adjustment he is supposed to be telling the truth" (R. 393).

The devastating effect of the admission of this evidence over the protest and objection of the petitioners was recognized by the trial Judge when he stated in the argument of the motion for a new trial that this restatement of partnership income "occupies practically the same legal status that a confession would" (R. 571).

Immediately following this proof the Government introduced five checks drawn on the Strauch and Sher account, all payable to cash and all dated December 22, 1943. One of these checks was in the amount of $7,800.00, and bore a notation that it was for the payment of an account with Al Gershh, a wholesale jeweler in New York. The second was for $6,000.00 and showed on its face "cash balance for merchandise, J. Lewis, New York City." The third was for $8,200.00 and showed "balance due for merchandise to Ed Wayne." The fourth was for $5,100.00 and showed "balance due I. Silverstein for merchandise," and the last one was for $2,900.00 "balance to Phillip Figarsky for merchandise" (R. 397-398).

Although it was shown by both the petitioners (R. 417) and the Government (R. 102) that many of the partnership's purchases were made in cash rather than by check because they were buying on the black market at prices above ceiling, it was the Government's insistence that these particular checks were not for the purchase of merchandise, but constituted a division of profits among the

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petitioners, since all of the checks were given on the same day and, while they were in odd amounts, they totaled exactly $30,000.00, which would have given each of the partners a $10,000 distribution.

Next, the Government proved that on January 9, 1945, three checks were drawn on the account of Strauch and Sher, all payable to cash, in the amounts of $11,510.00, $10,890.00, and $7,600.00. These checks showed on their face that they were each given for a "refund of merchandise advanced." While the checks were not shown on the partnership's expenditure book, the check stubs showed that they were given for the following accounts: The first one was to Jacob Strauch to reimburse him for accounts paid by him on behalf of the partnership to Leon Samet and Milton Greenberg, both of New York. The second was used to pay accounts owed to Lang, Jewelers, and I. Berkowitz, both of New York. And the third check was to pay Felix Mendelsohn and Milton Greenberg the accounts owed them by the partnership (R. 257-258, 401-404). It was the theory of the Government that since all of these checks were dated the same day and the total of the checks amounted to exactly $30,000.00, the same amount as the total of the five checks which had been introduced, dated in 1943, and since in January of 1945 Mr. Jacob Strauch made two $5,000.00 cash deposits in his own personal account, one of which was marked "Advance from S. & S." that these checks were not in payment of the bills which they purported to pay but constituted a distribution of profits (R. 258).

In addition to the foregoing evidence, the Government attempted to show that Jacob Strauch had underpaid his income taxes by the so-called "net worth method." Over objection of the petitioners, the Government was permitted to show that Mr. Strauch had furnished a net worth statement to the Government showing assets as of November

1, 1946, of $133,643.99, with liabilities of $20,600.00, making a net worth of $113,043.99 (R. 104-105, Plaintiff's Exhibit No. 9, R. 495). In admitting this testimony, the Court stated:

> "Now, of course, as I view it, this net worth statement would not be competent evidence unless the Government is able to prove the net worth at a prior date. I would think that the logical method of presenting it would be to select your beginning date first and prove the net worth and then prove this. But you've gone at it backwards, it looks to me like. But go ahead. I guess you will get the same result, **but unless you are able to establish the net worth at a prior date, then this evidence will be incompetent.**"

In an effort to prove a beginning net worth, the Government introduced the testimony of a banker from Memphis, Mr. Elmo Cox, who testified that on May 13, 1940, Mr. Jacob Strauch had given his bank a net worth statement in connection with an application for a loan in the amount of $4,000.00 (R. 161, 166). In this statement Mr. Strauch showed assets of $29,289.00 and liabilities of $250.00 (R. 163). Mr. Cox stated that many times a borrower in giving his financial status, would only include sufficient assets to justify the loan "without disclosing everything they've got" (R. 165, 166). Objection was made by the petitioners to this testimony, upon the ground that the proper date to ascertain the net worth of the petitioners was January 1, 1944, and not May, 1940. This objection was overruled, the Court stating:

> "Of course, that leaves a hiatus in there of two or three years they'll have to account for some way or the other. I don't know whether the Government is in a position to do that or not. They may be able satisfactorily to do that, or they may not be able to satisfactorily do it" (R. 163).

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In an effort to bring the 1940 financial statement up to January 1, 1944, the Government proved that in 1942 and 1943 Mr. Jacob Strauch reported, for income tax purposes, a net income of $4,420.38 and $5,218.38, respectively (R. 197). The Court then held that the records of the Government tending to show the income of Jacob Strauch for the years 1940 and 1941 were not admissible, as being improperly certified (R. 197, 201). Thereafter, the petitioners asked the Court to exclude all evidence of net worth of the petitioner, Jacob Strauch, because the Government had failed to show his net worth at the beginning of the period in question, or on January 1, 1944, for the reason that they did not show how much his net worth had been increased during the years 1940 and 1941. The Court overruled the motion and permitted the jury to consider all of the evidence introduced relating to net worth (R. 259-260).

When this insistence was again raised on motion for a new trial, the learned trial Judge observed:

> "Well, if you had objected to it at that time I would have sustained it. When the Government closed its case, I mean, if you had objected to that particular evidence I would have sustained it on the ground that it wouldn't have anything to do with the case. . . . I admitted it in the beginning because I thought the Government was going to proceed on the net worth theory, but it appeared that they didn't. They abandoned that" (R. 557).

It was then pointed out to the trial Judge that immediately upon the Government resting its case the petitioner made the following request:

> "May it please Your Honor, at this time we desire to move the Court to exclude from the consideration of the jury the testimony of the Government's witness Simpson with reference to net worth of the defendant Jacob

Strauch as of January 1, 1946, I believe, and the testimony of the witness Cox as to the net worth of the defendant Jacob Strauch as of January 1, 1940, on the ground that there has been no connection between those two net worths, and since the Government has now closed, I didn't want to have to go into that with this witness" (R. 259).

It was also pointed out that this objection was overruled; however, despite this statement by the Court, the Court took the motion for a new trial under advisement and later overruled it.

Finally, in his charge to the jury, the trial Judge stated:

"These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

"Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. **If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury.** If your verdict is guilty, then of course it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.

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"Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court." (Emphasis added.) (R. 485-486.)

REASONS FOR GRANTING THE WRIT.

1. The Opinion of the Court of Appeals Is in Conflict With Its Opinion in the Case of Ecklund v. United States, 159 F. 2d 81.

As above stated one of the two theories advanced by the Government to prove the guilt on the part of the petitioners was that they had withdrawn certain monies from the partnership under the guise of purchasing merchandise and paying operating expenses when in fact the withdrawals represented profits. In the main, this theory was supported only by indirect inferences from the record as, for example, the occasions at which certain money was withdrawn near the end of the year and the even amounts that were withdrawn—exactly $30,000.00 on two occasions. It is highly doubtful that the jury would have accepted

any such theory especially in view of the type witnesses who testified for the Government, at least one of whom the Judge placed in jail "until his memory was improved" (R. 160), about whom the Court stated "I wouldn't believe him on oath" (R. 169), except for the admission of "Restatement of Partnership Income" into the evidence.

Several years before the indictments in these cases and before the file was even referred to the Department of Justice for prosecution, petitioners had been in conferences with the Treasury Department in an effort to adjust their civil tax liability. As a basis of compromise, the petitioners submitted the so-called "Restatement of Partnership Income" to the Treasury Department. This statement transferred $3,000.00 from expenses to distribution of partnership income exactly in accord with the theory of the Government on the prosecution of the criminal cases. The effect of this evidence on the jury was tremendous, particularly in view of the comment made by the trial Judge when its introduction was objected to that "I don't see why a person wouldn't be required to tell the truth in compromising a civil liability just the same as they would a criminal liability" (R. 393).

We respectfully submit that evidence of an offer to compromise a civil liability is inadmissible in a criminal prosecution. This exact question was determined in the case of **Ecklund v. United States**, 159 F. 2d 81, wherein the Court of Appeals held:

> "Evidence of a civil-liability settlement previously made by the defendant in a criminal case of this character would have no real probative value to the effect that he had wilfully violated laws and regulations governing sales prices.
>
> * * * * * * *
>
> "It has long been recognized that evidence of an effort to compromise is inadmissible in a civil case. Home Insurance Co. v. Baltimore Warehouse Co., 93

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U. S. 527, 548, 23 L. Ed. 868. Why, then, should evidence of a settlement of a civil case be received in a criminal prosecution where the essential ingredients of liability are wholly at variance, in that no proof of wilful violation is necessary to establish civil liability but is a conditio sine qua non to criminal liability?

* * * * * * *

"The erroneous admission of the prejudicial evidence in this manner could well have tipped the scales against Ecklund in the weighing by the jury of the closely balanced conflicting testimony."

The holding in the present case is squarely in conflict with the holding of the Ecklund case. By its order of affirmance and again by its opinion overruling the petition to re-hear, the Court of Appeals held that the Restatement of Partnership Income was not a "proposition to compromise their possible civil income tax liability and that Ecklund v. United States, 159 Fed. 2d 81 (C. A. 6), does not control." Such an insistence was not even urged by the Government and, as we read the record, all parties as well as the trial Court recognized and agreed that this statement was made in support of, and as a part of, an offer in compromise. At the time the exhibit was offered, counsel for petitioners objected that this was "a computation of income taxable to the partnership which was offered in Washington at a conference in an effort to settle the income tax liability of these three defendants" (R. 387).

Although the United States Attorney claimed that the paper itself was not an offer in compromise, he conceded that: **"this is a statement of fact offered in support of the offer"** (Emphasis added) (R. 387).

The Trial Judge, after these statements had been made, was still not satisfied as to the purport of the exhibit, and

asked for a further explanation of the exhibit, whereupon counsel for the petitioners stated to the Court:

> "If your Honor please, that document, the restatement, as well as the statement signed by those individuals, was prepared by myself and my partner, Mr. Eichenbaum, who were called in on this case at an early stage, and without having an opportunity to thoroughly examine all the records and all the facts; that statement was prepared and the restatement of income was prepared on the train from records available there on the way to Washington for the purpose of presentation at a conference when an attempt was being made to settle the civil tax liability involved, at which time we conceded that these records themselves were not substantiated in some instances by documentary proof, and for that reason some items, if there was a doubt and no documentary proof was available to substantiate them, as this entry in issue here, **for the purpose of compromise we included that in the recomputation of income.**" (Emphasis added.) (R. 387-388.)

This statement was not excepted to or contradicted in any way by the attorneys representing the Government. All parties recognized that this document was filed by the petitioners with the Government in an effort to compromise and settle their civil income tax liability, and it could not have been prepared for any other purpose. The learned Trial Judge expressly recognized that it was submitted in an effort to compromise a civil income tax liability and compounded the error of its admission when he stated:

> "Well, I don't see why a person wouldn't be required to tell the truth in compromising the civil liability just the same as they would the criminal liability."

and, again:

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"Well, when a person makes a statement for the purpose of getting an adjustment he is supposed to be telling the truth" (R. 393).

Again, Mr. Albert B. Maloney, a Certified Public Accountant with several years experience as an employee of the Department of Internal Revenue, testified that there was nothing unusual about a taxpayer offering a statement similar to plaintiff's Exhibit Number Eighteen in an effort "to compromise a tax claim" (R. pp. 425-426).

2. A Conflict Exists Between Various Circuits On Establishing Guilt by the So-Called "Net Worth Method."

In the case of Jacob Strauch, who was indicted for the years 1944, 1945 and 1946, the Government established the petitioner's net worth at the end of 1946 as being $113,043.99 (R. 495). The Government further showed that in May, 1940, Mr. Strauch had made an application for a loan with a Memphis bank, showing a net worth of $29,039.00 (R. 163). The Government then proved that for the years 1942 and 1943 this petitioner had reported for tax purposes on an income of $4,420.38 and $5,218.38, respectively (R. 197). However, their efforts to prove the petitioner's income for the years 1940 and 1941 wholly failed, and no evidence whatsoever was introduced as to the possible increase in wealth for these two years. Despite the failure to prove income for these years and, therefore, the consequent failure to prove net worth at the beginning of the tax period, the Court of Appeals rejected the petitioner's contention that all evidence of net worth should be stricken, and held that such evidence was "relevant and corroborating the Government's contention that income not reported by appellant Jacob Strauch was received in the taxable years" (Order of Court of Appeals, p. 2, Appendix, p. 21).

This holding reaffirmed the conclusion reached by the Sixth Circuit in the case of **Friedberg v. United States**, 207 F. 2d 777 (certiorari granted), holding that certainty of net worth at the beginning of the tax period is not necessary to sustain a conviction. It further placed the Court of Appeals for the Sixth Circuit in accord with the holding of the Ninth Circuit in the case of **Rimmer v. United States**, 205 F. 2d 277, wherein certiorari has also been granted. These two circuits are in square conflict, however, with the Court of Appeals for the Fifth Circuit which held in the case of **Bryan v. United States**, 175 F. 2d 223, 225:

> "The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

Also, the Court of Appeals for the Third Circuit, which held in the case of **United States v. Fenwick**, 177 F. 2d 488, 490, 492:

> "Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence.
>
> • • • • • • • •
>
> "Where there is uncertainty as to whether all the assets of the defendant are included in the Government's computation of net worth, it follows that its computations cannot be relied upon. Essential proof of no other assets is the cornerstone of the evidence of the Government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

The rule followed by the Sixth Circuit is inconsistent with the very recent holding of the Seventh Circuit in the

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case of **Demetree v. United States,** 207 F. 2d 892, 894, wherein the practice of sustaining convictions obtained by the net worth method received highly critical treatment in the following language:

> "This kind of latitudinous allowance of the admission and use of conclusions as evidence and the submission of the case to the jury without a scrupulous adherence to the theory, has resulted in a tendency to accept, if not in the complete acceptance of, the idea that in a case tried by this method, ordinary rules of proof may be relaxed if not disregarded. Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a prima facie case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, estimates, conjectures, and conclusions which the government has been allowed to get into the record, upon the apparent theory that it is up to the defendant to explain all of it away as part of his burden to prove his innocence."

In view of the conflict of opinions between the various circuits and particularly in view of the fact that this Court has already recognized the conflict by granting the writ of certiorari in the **Rimmer case,** the **Friedberg case,** and the case of **United States v. Calderon** (C. A. 9), 207 F. 2d 377, all of which are now pending on the Court's docket, we respectfully submit that the writ should be granted in the cases at bar so that they may receive the same consideration as the other cases involving the identical question, and in which the writ of certiorari has already been granted.

3. The District Court's Charge Contained Plain Error Affecting Substantial Rights of the Petitioners.

As stated in the "Statement of the Case," the District Court instructed the jury as to both the maximum and minimum penalties prescribed by the statute in the event of a conviction and further cautioned the jury that should the petitioners be acquitted the Government could not review their action, the effect of which was to tell the jury that they could make no mistake by convicting the petitioners because the convictions could be set aside if the appellate court thought them to be erroneous. On the other hand, the Government could not correct any mistake made by the jury in the favor of the petitioners. It is true that the petitioners reserved no exception to this part of the Court's charge. The Court of Appeals with one Judge dissenting, found that this was not so plain an error as to require a reversal. The Court's refusal to reverse the action of the lower court in charging what sentence might be imposed in the event of a conviction is, we submit, in conflict with the holding of the Court of Appeals for the Fourth Circuit in the case of **Lovely v. United States**, 169 F. 2d 386, 391, wherein it was held:

> "And we think that error was committed to the prejudice of defendant when the jury was instructed that a person sentenced to life imprisonment was eligible to parole after fifteen years. The jury had nothing to do with the punishment of the defendant, except that under the statute they might decide whether or not he should be given capital punishment; and to charge as to eligibility for parole after fifteen years was to becloud the issue before them and open the way to a compromise verdict. What they were to decide was whether defendant was guilty or not and, if so, whether he should be given capital punishment. Whether he should be paroled after fifteen years, if not given capital punishment, was a matter which they could not decide and which should not have

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been called to their attention, even though they were told at the same time that they had nothing to do with it. See Ryan v. United States, 8 Cir., 99 F. 2d 864; Coward v. Com., 164 Va. 639, 178 S. E. 797."

The effect of this charge on the jury was most forcefully set out in the dissenting opinion of Judge Gourley which may be found in the appendix hereto, and particularly in the following language:

"I believe the error below is 'plain' within the meaning of the rule, and that it affects 'substantial rights.' I can perceive nothing more substantial than to have the members of the jury, in their deliberations, consider the fact that if a verdict of not guilty is returned, no right to appeal exists on the part of the Government, and to further consider the nature or extent of the punishment that the trial court could impose in the event of a verdict of guilty.

"Criminal jurisprudence has long recognized error and inherent danger to a fair trial when a jury is charged on the subject of punishment, and certainly, even more grievous error and peril to the impartial administration of justice would exist when reference is made to the Government's inability to appeal from a verdict of not guilty. **Ryan v. United States**, 8 Cir., 99 F. 2d 864; **Demetree v. United States**, 5 Cir., 207 F. 2d 892; 23 C. J. S., sec. 1290 (b), page 869; Housel and Walser, 2nd Ed., Defending and Prosecuting Federal Criminal Cases.

"When instructions have been made to a jury which should not be made, it is a question of judgment whether what was said was so prejudicial as to justify a reversal where the evidence is sufficient to support the conviction.

"I cannot conceive that the instructions made by the trial judge were not considered with some weight

in the determination of the guilt or innocence of the defendant.

"The administration of criminal justice in this democracy should not be subjected to the remotest hazard that a person be deprived of his liberty on any thoughts or ideas that do not relate directly to the facts as presented to establish a defendant's guilt."

CONCLUSION.

For the reasons stated, the petition for the writ of certiorari should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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APPENDIX.

Nos. 11,992, 11,993, 11,994

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Jacob Strauch, Appellant, v. United States of America, Appellee.	No. 11,992.
Alex Strauch, Appellant, v. United States of America, Appellee.	No. 11,993.
Harry Benjamin Sher, Appellant, v. United States of America, Appellee.	No. 11,994.

ORDER.

(Filed April 21, 1954.)

Before Allen, Circuit Judge, Starr and Gourley, District Judges.

This case came on to be heard on the record and briefs and oral argument of counsel;

And it appearing that in these cases, consolidated for trial by agreement of counsel, each case charging viola-

tions of 26 U. S. C., § 145 (b), appellant Jacob Strauch was indicted for wilfully and knowingly attempting to evade income taxes for the years 1944, 1945 and 1946, and appellants Alex Strauch and Harry Benjamin Sher were indicted for wilfully and knowingly attempting to evade income taxes for the years 1944 and 1945;

And it appearing that the jury found each appellant guilty as charged in the various indictments;

And it appearing that the net worth figures introduced by the government bearing on the charge against Jacob Strauch were relevant and corroborated the government's contention that income not reported by appellant Jacob Strauch was received in the taxable years;

And it appearing that appellants made no proposition to compromise their possible civil income tax liability and that **Ecklund v. United States**, 159 Fed. (2d) 81 (C. A. 6), does not control;

And it appearing that the Restatement of Partnership Income executed by all appellants, prepared for appellants at their own request, admitted that substantial variations existed between the Restatement and the income declared by appellants as partners in their tax returns for the years involved;

And no exception being taken to the charge of the court, the verdict being supported by substantial evidence and no reversible error existing in the record;

It Is Ordered that the judgments be and they hereby are affirmed.

Approved for entry:

/s/ Florence E. Allen,
United States Circuit Judge.

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Nos. 11992, 11993, 11994.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Jacob Strauch, Appellant, v. United States of America, Appellee.	No. 11992.
Alex Strauch, Appellant, v. United States of America, Appellee.	No. 11993.
Harry Benjamin Sher, Appellant, v. United States of America, Appellee.	No. 11994.

Decided June 17, 1954.

MEMORANDUM ON PETITION FOR REHEARING.

(Filed June 17, 1954.)

Before Allen, Circuit Judge, Starr and Gourley, District Judges.

Allen, Circuit Judge. This case is before the court upon petition for rehearing. Appellants urge (1) that the court erred in not holding the **Ecklund** case, 159 Fed. (2d)

81 (C. A. 6) controlling, and (2) that the judgment should be reversed because of prejudicial error in the charge of the trial court. The question whether the statement of income filed voluntarily by the three appellants constituted an offer of compromise was fully considered in connection with the hearing and we adhere to our conclusion that **Ecklund v. United States,** supra, does not govern this controversy. Under this record the statement filed was not an offer of compromise and was admissible.

The question whether the District Court erred in charging upon the subject of the penalty provided under § 145 (b) of Title 26 U. S. C. for willful attempt to evade or defeat income taxes was not considered in the trial but was raised at the hearing by one of the members of this court. This portion of the charge was included in the general charge, was not excepted to by able counsel nor attacked by them either in brief or argument upon the hearing in this court. The majority of the court thinks that the charge, the pertinent portion of which is given in the margain,[1] was not prejudicial. We think the state-

[1] "These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

"Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury. If your verdict is guilty, then, of course, it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.

"Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one

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ment by the court, "If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury," was favorable to appellants and under the facts of this case it could not have induced a conviction. The three indictments set forth alleged income tax evasion for the taxable years, two of the appellants being charged with falsifying the income from a partnership of which all three appellants were members, and the third appellant being charged with failure to declare income from the partnership and also from an individual business which he owned. After the investigation of possible tax evasion began the three appellants voluntarily executed a statement setting forth material variations from the taxes reported by them in the taxable years and concerning these variations made the following statement:

> "This statement executed by Harry B. Sher, Alex Strauch and Jacob Strauch this 12th day of December, 1949:
>
> "Having re-examined, at the request of my counsel and auditors, the books and records of Strauch & Sher, a partnership, and having, pursuant to request, re-examined supporting memoranda with reference to sales and expenditures of the said partnership.
>
> "It is the opinion and belief of the undersigned that a corrected statement of income of the said partnership is properly reflected in the exhibit hereto at-

---

cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court."

tached, entitled 'Restatement of Partnership Income,' and that taxable income of the undersigned should be appropriately computed as a result of the said restatement:

"Further, that the variations resulting from the totals reflecting in the said restatement from the income as reported by the individuals, or as set forth in explanatory comments heretofore submitted are attributable to error in maintenance of records and the classification of items of income and expense and are not attributable to intent on the part of the undersigned to defraud the government, or willfully, to evade the payment of any income taxes as and when due.

"This statement has been prepared at our request in conformance with information furnished by ourselves.

"/s/ Harry B. Sher,
/s/ Alex Strauch,
/s/ Jacob Strauch."

It was shown by this statement and the records of the partnership that all three appellants in the years 1944 to 1946, inclusive, received income on which they failed to pay a tax. The bank deposits of Jacob Strauch showed that he had received income in 1944, 1945 and 1946 from an individual jewelry business on which he did not pay a tax. The evidence upon these points was overwhelming. In the face of this evidence, much of it taken from appellants' own books of account, the jury found appellants guilty. We see nothing in the court's statement which can be construed as asking the jury to convict, and in addition we cannot conceive that under this record this portion of the court's instructions could have influenced the jury as to conviction. The lack of exception by experienced counsel and the total failure to argue at the hearing in this court the point now stressed strongly in-

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dicates that the error of the trial court, which is not to be commended, was not prejudicial. None of the cases relied upon are in point. In **Lovely v. United States,** 169 Fed. (2d) 386 (C. A. 4), serious error to the prejudice of the defendant was committed in the admission of testimony. Also the court in explaining that the sentence carried a life penalty stated that the defendant was eligible to parole after fifteen years. In **Demetree v. United States,** 207 Fed. (2d) 892 (C. A. 5), the jury repeatedly reported that it was unable to agree upon a verdict and finally asked the judge to state what the punishment would be. The judge assured the jury that the maximum sentence would not be imposed. These cases afford no assistance in solving the problem presented here.

The majority of the court concludes that, as no prejudicial error existed in the conduct of the trial nor in the charge of the court, the petition for rehearing must be denied.

DISSENTING OPINION.

Gourley, District Judge. In these criminal appeals from a jury verdict of guilty, I joined in a per curiam order affirming the judgments of the District Court since I believed substantial evidence existed to support the verdicts. I was also of the opinion, and continue to so believe, that no error existed in the record to which objection was made or exception taken. There was no basis to sustain any of the assignments of error presented by the defendants in their appeal.

Nevertheless, during the argument of the appeal, I noticed what I considered "plain error" in the charge of the trial judge which I believed affected substantial rights of the defendants.

The following portion of the District Judge's charge to the jury, in my judgment, poignantly poses the question of "plain error."

> "These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> "Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. **If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury.** If your verdict is guilty, then of course it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.
>
> "Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine

him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court" (R. 485-486).

The question of plain or substantial error was not argued and counsel for the litigants were not prepared to enlighten the court on applicable principles of law.

Opportunity has now existed for an independent research and more reflected judgment to be made of the law, and I am now convinced that substantial or plain error does exist which materially affected the rights of the defendants.

I must, therefore, vacate my joinder in the per curiam order of affirmation and respectfully dissent to the judgment of my learned colleagues.

It is incumbent upon this court to take notice of substantial or plain error, whether or not such error was raised by counsel at time of trial or laid as an assignment of error in appeal.

The law provides an impenetrable cloak of protection about a defendant in a criminal proceeding which requires the court of appeals, in cases of serious criminal offenses to carefully check the record for error prejudicial to defendant, whether such error had been urged upon the court or not. **Tatum v. United States**, 3 Cir., 190 F. 2d 612.

Undoubtedly, as a matter of administrative policy, to avoid any unnecessary appeals and new trials, it is important that errors, which inevitably will occur from time to time in extemporaneous charges of the most competent

judges, be pointed out immediately by trial counsel with a view to their correction then and there. That policy is enforced in many cases by refusal to review for defects in a charge not challenged at the trial. Indeed, the silence of counsel often suggests that errors seem trivial at that time. But where, particularly in a criminal case, several errors appear, which in the aggregate contain the potential of substantial damage to the accused, the policy of sound and time saving trial administration which would penalize failure to point out error below may have to yield to more important considerations of making sure that the accused has been treated fairly. **United States v. Cumberland,** 3 Cir., 200 F. 2d 609; **Miller v. Commonwealth of Ky.,** 6 Cir., 40 F. 2d 820; **Morris v. United States,** 9 Cir., 156 F. 2d 525; **United States v. Raub,** 7 Cir., 177 F. 2d 312; **Logan v. United States,** 5 Cir., 192 F. 2d 388; **Wyche v. United States,** CCA D.D., 193 F. 2d 703; **Apodaca v. United States,** 10 Cir., 188 F. 2d 932; **Rose v. United States,** 10 Cir., 128 F. 2d 622; **Remmer v. United States,** 9 Cir., 205 F. 2d 277.

Thus, the question is resolved as to whether the error committed was of so fundamental a nature that the court of appeals should exercise the power provided by Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.

I believe the error below is "plain" within the meaning of the rule, and that it affects "substantial rights." I can perceive nothing more substantial than to have the members of the jury, in their deliberation, consider the fact that if a verdict of not guilty is returned, no right to appeal exists on the part of the Government, and to further consider the nature or extent of the punishment that the trial court could impose in the event of a verdict of guilty.

Criminal jurisprudence has long recognized error and inherent danger to a fair trial when a jury is charged on

the subject of punishment, and certainly, even more grievous error and peril to the impartial administration of justice would exist when reference is made to the Government's inability to appeal from a verdict of not guilty. **Ryan v. United States,** 8 Cir., 99 F. 2d 864; **Demetree v. United States,** 5 Cir., 207 F. 2d 892; 23 C. J. S. § 1290 (b) page 869; Housel and Walser, 2nd Ed., Defending and Prosecuting Federal Criminal Cases.

When instructions have been made to a jury which should not be made, it is a question of judgment whether what was said was so prejudicial as to justify a reversal where the evidence is sufficient to support the conviction.

I cannot conceive that the instructions made by the trial judge were not considered with some weight in the determination of the guilt or innocence of the defendant.

The administration of criminal justice in this democracy should not be subjected to the remotest hazard that a person be deprived of his liberty on any thoughts or ideas that do not relate directly to the facts as presented to establish a defendant's guilt.

I, therefore, respectfully dissent from the judgment of my distinguished colleagues and believe that a new trial should be awarded and the proceeding remanded to the District Court.

Since the formulation of the within dissent, defendants have made application to the court for rehearing and for the reasons herein stated, I believe rehearing should be granted.